The Machine Gun Statute: Its Controversial Past and Possible Future

Leslie Wepner
COMMENT

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INTRODUCTION

On March 10, 1992, Alfonso Lopez carried a .38 caliber handgun and five bullets into a school zone.1 In April 1992, on two consecutive days, Raymond Rybar, a federally licensed firearms dealer, attended a gun show where he brought, offered to sell, and was paid for both a 7.62 millimeter and .45 caliber submachine gun.2 In 2002, Angel Raich, who cultivated her own marijuana, and Diane Monson, who purchased marijuana from unknown sources, were found to possess marijuana in their homes.3 These individuals were found guilty of violating federal statutes outlawing possession of a handgun in a school zone,4 possession of a machine gun,5 and possession of marijuana,6 respectively.

Although carrying a gun in a school zone, possessing a machine gun, and possessing marijuana all involve criminal-like activities, Congress has not regulated all three acts through federal statutes in exactly the same manner. Moreover, the federal judiciary’s responses to challenges to such statutes under the Commerce Clause have varied.

For example, the Gun-Free School Zone Act, which made it unlawful to possess a gun in a school zone, was struck down by the U.S. Supreme Court as violating the Commerce Clause in United States v. Lopez.7 More recently, in Gonzales v. Raich, the Supreme Court upheld, in the face of a Commerce Clause challenge, the Controlled Substance Act (CSA), which makes it unlawful to possess marijuana.8 Although these decisions may

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3. See Gonzales v. Raich, 545 U.S. 1, 25-26 (2005).
4. See Lopez, 514 U.S. at 551.
7. 514 U.S. at 551.
8. Raich, 545 U.S. 1.
appear to be contradictory—the statute in *Lopez* was overturned while in *Raich* the statute was upheld—the reasoning behind the Court's two decisions is extraordinarily similar. Yet, despite the Supreme Court's consistent approach to the Commerce Clause, while sitting on the U.S. Court of Appeals for the Third Circuit, then-Judge Samuel A. Alito dissented in *United States v. Rybar*, where the majority had applied that consistent reasoning established in *Lopez* and reaffirmed in *Raich*.

Specifically, in *Rybar*, applying the Supreme Court's Commerce Clause reasoning, Judge Alito was unable sufficiently to distinguish possession of a handgun in a school zone from general possession of a machine gun to justify federal statutory prevention of the latter but not the former. In view of Justice Alito's elevation to the Supreme Court, his opinion on matters such as the Commerce Clause is more significant and more relevant than ever. This Comment will thus analyze Justice Alito's troubling dissent in *Rybar*—how it differs from Supreme Court precedent and what impact his reasoning could have today.

Part I of this Comment details the historical evolution of Commerce Clause challenges before the Supreme Court, focusing on the precedent established by *Lopez* pertaining to criminal legislation that has recently been reaffirmed by *Raich*. Part II then explores the controversy that the Third Circuit faced in *Rybar* over the constitutionality of the Machine Gun Statute, laying out the differences between the majority opinion and Judge Alito's dissent. Finally, Part III of this Comment discusses the reasons why Judge Alito's dissent improperly applied the Supreme Court precedent established by *Lopez*, and concludes, based on precedent, that the Machine Gun Statute would likely be upheld should the current Supreme Court ever consider its constitutionality.

**I. SUPREME COMMERCE CLAUSE JURISPRUDENCE**

**A. The Origin of the Supreme Court's Interpretation of the Commerce Clause**

The Constitution gives Congress certain enumerated powers to enact legislation. One such power is the power vested in Congress through the
The Commerce Clause states that Congress shall have the power \"[t]o regulate Commerce ... among the several States.\"\n
The judiciary first identified the purpose of the Commerce Clause in *Gibbons v. Ogden*. In *Gibbons*, Chief Justice John Marshall wrote, \"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.\" Congress, however, was not at that time, nor is it today, vested with unlimited power to regulate interstate commerce. The primary purpose of the Commerce Clause was initially \"to preclude the kind of discriminatory state legislation that had once been permissible.\" Nevertheless, some activities such as manufacturing, mining, and production were determined early on by the Court to be better left for regulation by the states because they were strictly \"local\" activities.

Congress's enactment of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890 represented a significant turning point in Commerce Clause legislation. At first, such legislation was met with some resistance. Yet, the Court recognized that \"where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation.\" Finally, in 1935, the Court drew the distinction between direct and indirect effects on

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17. Id.
19. Id. at 189-90.
20. Gonzales v. Raich, 545 U.S. 1, 16 (2005).
21. See Wickard v. Filburn, 317 U.S. 111, 119-20 (1942) (describing the historical rationale for regulation by statutes where the U.S. Supreme Court ultimately upheld a statute that regulated farmers' homegrown consumption of wheat). For additional examples of cases in which local activities were involved, see infra note 23.
23. See, e.g., Carter v. Carter Coal Co., 298 U.S. 338, 304 (1936) (\"Mining brings the subject matter of commerce into existence. Commerce disposes of it.\"); United Leather Workers Int'l Union, Local Lodge or Union No. 66 v. Herkert & Meisel Trunk Co., 265 U.S. 457, 464-65 (1924) (emphasizing the need for interstate commerce to be involved in order for Congress to regulate rightfully under the Commerce Clause); Hammer v. Dagenhart, 247 U.S. 251, 272 (1918) (\"The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof.\" (citing Delaware, Lackawanna & Western R.R. v. Yurkonis, 238 U.S. 439 (1915))); United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (holding that Congress could not regulate manufacturing); see also Anthony E. Varona & Kevin Layton, *Anchoring Justice: The Constitutionality of the Local Law Enforcement Enhancement Act in United States v. Morrison's Shifting Seas*, 12 Stan. L. & Pol'y Rev. 9, 11-12 (2001) (describing the resistance to early Commerce Clause legislation).
24. Lopez, 514 U.S. at 554 (referring to the *Shreveport Rate Cases*, 234 U.S. 342 (1914)).
interstate commerce: direct effects involve those activities within Congress’s power to control; indirect effects involve those activities not within Congress’s control. The distinction between direct and indirect effects at that time became a necessary component for the Court in evaluating Commerce Clause challenges.

At first, federal criminal jurisdiction under the Commerce Clause in some instances followed a direct versus indirect framework. In Champion v. Ames, the Court held that Congress was entitled to regulate specific items that would enter commerce. Further, in Hoke v. United States, the Court upheld a statute prohibiting the transportation into commerce of any “woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.” These cases illustrate the growing trend of Congress regulating criminal activities via the Commerce Clause, but also emphasize the necessity of a direct impact on commerce to justify legislation.

Federal criminal legislation was not, however, only based on the Commerce Clause. In 1914, Congress relied on the federal government’s power to raise revenues and to tax to enact the Harrison Act, the predecessor to the CSA. Congress enacted the Harrison Act to “exert control over the possession and sale of narcotics . . . by requiring producers, distributors, and purchasers to register with the Federal Government, by assessing taxes against parties so registered, and by regulating the issuance of prescriptions.” Similarly, in 1937, Congress passed the Marihuana Tax Act that did not outlaw marijuana but rather imposed tax and registration requirements. Relying on Congress’s power to raise revenue and tax eventually proved to be futile when it came to criminal legislation.

25. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548-50 (1935); see also Schapiro & Buzbee, supra note 22, at 1214 (describing the early direct/indirect distinction).


33. Raich, 545 U.S. at 11; see also infra note 93.

34. See Raich, 545 U.S. at 11-12 (explaining how relying on Congress’s power to tax fell out of favor).
Justifying criminal legislation through the Commerce Clause eventually became quite an effective substitute.\textsuperscript{35} Part I.B evaluates the revolutionary approach to Commerce Clause legislation and the Supreme Court's responses to the eventual challenges of such statutes.

B. The Birth of the Substantial Economic Effects Test

In 1937, a major shift in congressional legislation occurred that had a substantial impact on federal criminal legislation.\textsuperscript{36} That year the Court upheld the National Labor Relations Act (NLRA) against a Commerce Clause challenge and determined that Congress had the power to regulate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions," thereby eliminating the necessity to find a direct effect on interstate commerce.\textsuperscript{37} In \textit{NLRB v. Jones & Laughlin Steel Corp.}, the Court found that Jones & Laughlin had violated the NLRA by engaging in unfair labor practices by discriminating against employees.\textsuperscript{38} Then in 1941, in \textit{United States v. Darby}, the Court upheld the Fair Labor Standards Act that set up a scheme to "prevent[] the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions" where there is a failure to "conform to standards set up by the Act."\textsuperscript{39} One year later, in \textit{Wickard v. Filburn}, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 that regulated the production and consumption of homegrown wheat.\textsuperscript{40} Explicitly rejecting the earlier distinction between direct and indirect effects on interstate commerce,\textsuperscript{41} the Court stated,

\begin{quote}
[Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as "direct" or "indirect."\textsuperscript{42}]
\end{quote}

The Court had further noted that although the farmer's activity of consuming homegrown wheat in \textit{Filburn} seemed "trivial," taken together

\textsuperscript{35} See id. at 15 (explaining that the Controlled Substance Act (CSA) is justified under the Commerce Clause).
\textsuperscript{37} \textit{NLRB v. Jones & Laughlin Steel Corp.}, 301 U.S. 1, 37 (1937).
\textsuperscript{38} \textit{Id.} at 22, 48-49.
\textsuperscript{39} United States v. Darby, 312 U.S. 100, 109, 118 (1941) ("The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.").
\textsuperscript{40} \textit{See Wickard v. Filburn}, 317 U.S. 111, 128-29 (1942).
\textsuperscript{41} \textit{See supra} notes 25-26 and accompanying text.
\textsuperscript{42} \textit{Wickard}, 317 U.S. at 125.
with others "similarly situated," the farmer's activities could become significant.\textsuperscript{43}

Having established that Congress could regulate activity that has a substantial effect on interstate commerce, the Court continued to uphold numerous statutes that arguably had more of a social impact on society than an economic effect.\textsuperscript{44} By 1971, the scope of Congress's Commerce Clause power was defined by the Court to include regulation of the channels and instrumentalities of interstate commerce, in addition to those activities that have a substantial economic effect on the economy.\textsuperscript{45} In \textit{Perez v. United States}, a case involving criminal legislation, the Court acknowledged that "[e]xtortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce."\textsuperscript{46} This landmark decision represented the Court's departure from rationalizing criminal legislation through ascertaining whether there was a direct effect on interstate commerce to a more liberal approach involving evaluating whether there was a substantial cumulative economic impact on interstate commerce.\textsuperscript{47} As discussed in Part I.C, however, Commerce Clause limitations were, with hindsight, inevitable.

C. Lopez: \textit{The Supreme Court Limits the Substantial Economic Effects Test}

The Court, in \textit{United States v. Lopez}, finally established judicial limitations on Commerce Clause legislation.\textsuperscript{48} The Gun-Free School Zones Act of 1990, the statute in question in \textit{Lopez}, made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."\textsuperscript{49} The Court acknowledged that \textit{NLRB, Darby}, and \textit{Wickard} "ushered in an era of Commerce Clause jurisprudence,"\textsuperscript{50} which was in part a result of the

\begin{footnotes}
\item[44.] See, e.g., Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964) (upholding a statute that made it unlawful to not serve African Americans at a local Alabama restaurant); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964) (upholding the public accommodations provisions of the Civil Rights Act of 1964 that precluded racial discrimination, in this case, at a Georgia hotel).
\item[45.] See \textit{Lopez}, 514 U.S. at 558; see also \textit{Perez v. United States}, 402 U.S. 146, 150 (1971) ("The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods . . . or of persons who have been kidnapped . . . . Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft . . . , or persons or things in commerce, as, for example, thefts from interstate shipments . . . . Third, those activities affecting commerce . . . .").
\item[46.] \textit{Perez}, 402 U.S. at 154.
\item[47.] See Abrams & Beale, supra note 28, at 38.
\item[48.] \textit{Lopez}, 514 U.S. at 565.
\item[49.] Id. at 551 (internal quotation marks omitted).
\item[50.] Id. at 556; see also supra notes 37-40 and accompanying text.
\end{footnotes}
changing economic landscape in the country.\textsuperscript{51} The Court, however, also acknowledged that modern-era precedents were "subject to outer limits."\textsuperscript{52} For the first time in a long history of liberally drawing a link to interstate commerce, the Court, unlike Congress, could not rationalize a way to link guns in school zones to interstate commerce.\textsuperscript{53}

The government had argued in \textit{Lopez} that the statute involved the possibility that possession of a firearm in a school zone would substantially affect interstate commerce.\textsuperscript{54} The government had contended that firearms could lead to violent crimes, and that violent crimes could lead to heavy costs on the government in dealing with such violent crimes, or reduce the desire for individuals to travel to areas "perceived to be unsafe."\textsuperscript{55} Finally, the government had argued that a serious threat to the educational process exists when guns are allowed in school zones.\textsuperscript{56}

In accord with the government’s position, Justice Stephen Breyer wrote in his \textit{Lopez} dissent that "Congress . . . could rationally conclude that schools fall on the commercial side of the line."\textsuperscript{57} However, the majority opinion rejected these arguments and held that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."\textsuperscript{58} Moreover, the Court concluded that the "[r]espondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce."\textsuperscript{59} The Court determined that, unlike earlier cases such as \textit{Wickard} and \textit{Perez},\textsuperscript{60} connecting possession of guns in a school zone to interstate commerce required too tenuous a link.\textsuperscript{61} Finally, the Court expressed a federalism concern, stating that "[w]hen Congress criminalizes conduct already denounced as criminal

\textsuperscript{51} \textit{Lopez}, 514 U.S. at 556 ("Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.").

\textsuperscript{52} \textit{Id.} at 557.

\textsuperscript{53} \textit{Id.} at 559-60 (stating that the Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce. Examples include the regulation of intrastate coal mining, [Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc., 452 U.S. 264 (1981)], intrastate extortionate credit transactions, [Perez v. United States, 402 U.S. 146 (1971)], restaurants utilizing substantial interstate supplies, [Katzenbach v. McClung, 379 U.S. 294, 299-301 (1964)], inns and hotels catering to interstate guests, [Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-53 (1964)], and production and consumption of homegrown wheat, [Wickard v. Filburn, 317 U.S. 111, 199-20 (1942)]").

\textsuperscript{54} \textit{Id.} at 563-64.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.} at 564.

\textsuperscript{57} \textit{Id.} at 629 (Breyer, J., dissenting).

\textsuperscript{58} \textit{Id.} at 567 (majority opinion).

\textsuperscript{59} \textit{Id.}

\textsuperscript{60} See \textit{supra} notes 21, 45.

\textsuperscript{61} See \textit{Lopez}, 514 U.S. at 567.
by the States, it effects a change in the sensitive relation between federal
and state criminal jurisdiction."62

*Lopez* was a landmark decision and featured a sharply divided Court.63
The four dissenters have been interpreted to have found that the following
reasoning should be applied:

[L]ocal activities may be regulated under the Commerce Clause where
they significantly affect interstate commerce; . . . these local activities
must be considered cumulatively in viewing their effect on interstate
commerce; . . . [and] the court's inquiry is limited to whether Congress
could have had a rational basis for concluding the regulated activity
sufficiently affected interstate commerce.64

The dissenting Justices found that a rational basis existed to warrant
upholding the statute.65 For example, Justice John Paul Stevens
emphasized the commercial nature of firearms and therefore the
appropriateness of Congress regulating firearms.66 Additionally, Justice
Breyer found that “[n]umerous reports and studies—generated both inside
and outside government—make clear that Congress could reasonably have
found the empirical connection that its law, implicitly or explicitly, asserts”
to rationalize upholding the Gun-Free School Zones Act.67 The dissenters,
however, obviously could not win over the Justices who formed the
majority.

Despite strong dissents, *Lopez* had staying power. In a similarly
reasoned case, *United States v. Morrison*, the Court held that a statute that
provided a federal civil remedy for the victims of gender-motivated

62. *Id.* at 561 n.3; see Christie, *supra* note 15, at 977 (“Believers in . . . federalism
cheered . . . *Lopez* . . . since the Supreme Court was, for the first time since the 1930s, trying
to define some limits to federal commerce power.”); see also Christina E. Coleman, Note,
*The Future of the Federalism Revolution*: Gonzales v. Raich and the Legacy of the
Rehnquist Court, 37 Loy. U. Chi. L.J. 803, 818 (2006) (acknowledging that “the so-called
revolutionary decision[] in *Lopez* . . . w[as] so limited that very little had changed”).

63. Chief Justice William Rehnquist delivered the opinion of the Court, in which
Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas
O'Connor joined. *Id.* at 568 (Kennedy, J., concurring). Justice Thomas filed a concurring
opinion. *Id.* at 584 (Thomas, J., concurring). Justices John Paul Stevens and David Souter
filed dissenting opinions. *Id.* at 602 (Stevens, J., dissenting); *id.* at 603 (Souter, J.,
dissenting). Justice Stephen Breyer filed a dissenting opinion, in which Justices Stevens,
Souter, and Ruth Bader Ginsburg joined. *Id.* at 615 (Breyer, J., dissenting).

64. See *United States v. Rybar*, 103 F.3d 273, 277 (3d Cir. 1996) (internal quotation
marks omitted) (summarizing the *Lopez* dissent).

65. See *Lopez*, 514 U.S. at 603 (Stevens, J., dissenting).

66. See *id.* at 602-03 (“Guns are both articles of commerce and articles that can be used
to restrain commerce. Their possession is the consequence, either directly or indirectly, of
commercial activity. In my judgment, Congress' power to regulate commerce in firearms
includes the power to prohibit possession of guns at any location because of their potentially
harmful use; it necessarily follows that Congress may also prohibit their possession in
particular markets.”).

67. *Id.* at 619 (Breyer, J., dissenting).
violence was an unconstitutional application of the Commerce Clause. In *Morrison*, the Court acknowledged the change in the Commerce Clause trend and held that gender-motivated violent crimes are just as noneconomic as is possession of a gun in a school zone. The majority again cited federalism issues. In the end, the Court could not draw a link to interstate commerce and thus invalidated the statute.

The Court also stated in *Morrison* that during the period between *Wickard* and *Lopez*, the Court might have upheld the statute in *Morrison* because the nation had experienced "a period in which the law enjoyed a stable understanding that congressional power under the Commerce Clause, complemented by the authority of the Necessary and Proper Clause." However, the Court noted that, after *Lopez*, the substantial cumulative effects test was subject to more exacting scrutiny and demanded a "new criterion of review."

Just a decade later, the Supreme Court reaffirmed its *Lopez* holding in *Raich*. Part I.D evaluates the less than revolutionary approach taken by the Supreme Court in *Raich*.

D. The Court's Recent Take on Commerce Clause Analysis as Exhibited in *Raich*

*Lopez* involved regulating possession of a handgun in a school zone—"a discrete area unlikely to have a meaningful aggregate effect on commerce." *Gonzales v. Raich*, however, involved regulating possession of marijuana anywhere. *Raich* began as a case brought by Angel Raich and Diane Monson, users of marijuana for medicinal purposes made lawful under California law, against the Attorney General of the United States and the head of the Drug Enforcement Administration, seeking an injunction

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68. United States v. Morrison, 529 U.S. 598, 602 (2000); see also Coleman, supra note 62, at 818 (acknowledging that similar to *Lopez*, *Morrison* "w[as] so limited that very little had changed").
69. Chief Justice Rehnquist delivered the opinion of the Court. *Morrison*, 529 U.S. 598. Justice Thomas concurred and filed an opinion. *Id*. at 627 (Thomas, J., concurring). Justice Souter filed a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. *Id*. at 628 (Souter, J., dissenting). Justice Breyer filed a dissenting opinion in which Justice Stevens joined, and in which Justices Souter and Ginsburg joined in part. *Id*. at 655 (Breyer, J., dissenting).
70. *Id*. at 613 (majority opinion).
71. See Linda Greenhouse, *The Rehnquist Court and its Imperiled States' Rights Legacy*, N.Y. Times, June 12, 2005, at WK3 (pointing out that Justice O'Connor's "commitment to the federalism agenda had led her . . . to vote with the majority to strike down a central portion of the Violence Against Women Act [in *Morrison*], which authorized victims of crimes 'motivated by gender' to sue their attackers in federal court").
73. *Id* (citing U.S. Const. art. I., § 8, cl. 18).
74. *Id*.
75. See infra Part I.D.
76. United States v. Rybar, 103 F.3d 273, 282 (3d Cir. 1996) (discussing *Lopez*).
77. See Gonzalez v. Raich, 545 U.S. 1, 14-15 (2005).
and declaratory relief ‘prohibiting the enforcement of the . . . [CSA].’”

The Court in Raich had to determine whether Congress had the authority under the Commerce Clause to enact the CSA and thereby override a state-established exception to the general ban on possessing marijuana for medicinal purposes. The CSA makes it unlawful to “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Further, marijuana had been classified as a Schedule I drug under 21 U.S.C. § 812(c), that is, a controlled substance. California was the first state to authorize limited use of marijuana for medicinal purposes.

The Court preliminarily concluded that “[w]e have never required Congress to legislate with scientific exactitude. When Congress decides that the ‘total incidence’ of a practice poses a threat to a national market, it

78. Id. at 7.
79. See supra note 8 and accompanying text.
80. Raich, 545 U.S. at 15. The respondents challenged not the constitutionality of the CSA but rather whether CSA’s “categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes pursuant to California law exceeds Congress’ authority under the Commerce Clause.” Id.
82. Raich, 545 U.S. at 12 (“The CSA categorizes all controlled substances into five schedules. The drugs are grouped together based on their accepted medical uses, the potential for abuse, and their psychological and physical effects on the body. . . . In enacting the CSA, Congress classified marijuana as a Schedule I drug. . . . Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study.” (citing 21 U.S.C. § 812 (2000) throughout) (internal citations omitted)); see also Casey L. Carhart, Will the Ever-Swinging Pendulum of Commerce Clause Interpretation Ever Stop? A Casenote on Gonzales v. Raich, 27 Whittier L. Rev. 833, 838 (2006) (discussing the classification of drugs).
83. See Raich, 545 U.S. at 5-6 (“In 1913, California was one of the first States to prohibit the sale and possession of marijuana, and at the end of the century, California became the first State to authorize limited use of the drug for medicinal purposes. In 1996, California voters passed . . . the Compassionate Use Act of 1996. The proposition was designed to ensure that ‘seriously ill’ residents of the State have access to marijuana for medical purposes, and to encourage Federal and State Governments to take steps towards ensuring the safe and affordable distribution of the drug to patients in need. The Act create[d] an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.”).
84. Justice Stevens delivered the majority opinion in which Justices Kennedy, Souter, Ginsberg, and Breyer joined. Raich, 545 U.S. 1. Justice Scalia concurred. Id. at 33 (Scalia, J. concurring). Justice O’Connor delivered a dissent in which Justices Rehnquist and Thomas joined. Id. at 42 (O’Connor, J., dissenting). Justice Thomas also filed a separate dissent. Id. at 57 (Thomas, J., dissenting).
may regulate the entire class." Relying on the Court’s rationale in Wickard, the Court further established that, “if [the Court] concludes that failure to regulate [a] class of activity would undercut the regulation of the interstate market in that commodity,” Congress can regulate that activity.

Although marijuana is illegal and wheat, the product at issue in Wickard, was not, the Court in Raich found the similarities between the two cases to be “striking.” As the Court noted, a primary purpose of the CSA is “to control the supply and demand of controlled substances in both lawful and unlawful drug markets.” Congress, the Court concluded, “had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions.” Moreover, the Court acknowledged that it “need not determine whether respondents’ activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a ‘rational basis’ exists for so concluding.” The Court held that a rational basis existed for such a statute and thus upheld the constitutionality of the CSA and its applicability to medicinal marijuana in the state of California.

In drawing its conclusion, despite upholding the constitutionality of the statute in Raich, the Court remained loyal to its holding in Lopez by distinguishing Raich from Lopez. First, the Court acknowledged that the

85. Id. at 17-18 (majority opinion) (quoting Perez v. United States, 402 U.S. 146, 154-55 (1971)); see M. Wesley Clark, Can State “Medical” Marijuana Statutes Survive The Sovereign’s Federal Drug Laws? A Toke Too Far, 35 U. Balt. L. Rev. 1, 22 (2005) (“Such an inevitable increase of the marijuana supply in the California market would, when combined with that to be expected from the eight or so other ‘medical’ marijuana states, lead to the quite rational conclusion, one which Congress could have reached, ‘that the aggregate impact on the national market of all the transactions exempted from federal supervision is unquestionably substantial.’”) (quoting Raich, 545 U.S. at 32)).

86. Raich, 545 U.S. at 18.
87. Id.
88. Raich, 545 U.S. at 19.
89. Id.
90. Id. at 22 (quoting United States v. Lopez, 514 U.S. 549, 557 (1995)).
91. See id.
92. See Richard A. Epstein, The Federalism Decisions of Justices Rehnquist and O’Connor: Is Half a Loaf Enough?, 58 Stan. L. Rev. 1793, 1803-04 (2006) (finding that Raich was distinguishable from Lopez and therefore not inconsistent with the Lopez holding); Nolan Mitchell, Preserving the Privilege: Codification of Selective Waiver and the Limits of Federal Power over State Courts, 86 B.U. L. Rev. 691, 733 (2006) (finding that instead of overturning Lopez and Morrison, Raich limited those “cases to their facts”). From a federalism perspective, the Court in Raich deviated from its position in Lopez. See Christie, supra note 15, at 977 (finding that Raich symbolized that the “modern ‘federalism revolution’ was short-lived”); Coleman, supra note 62, at 863-64 (“The Raich holding’s expansive interpretation of the Commerce Clause undermined the Rehnquist Court’s shift toward federalism and the restriction of congressional power with the landmark decisions of Lopez and Morrison.”). Scalia, typically a federalism devotee, surprisingly voted with the majority in Raich to uphold the CSA. See infra notes 100-06 and accompanying text; see also George D. Brown, Counterrevolution?—National Criminal Law After Raich?, 66 Ohio St. L.J. 947, 948-49 (2005) (finding that in Raich, “the Supreme Court called a halt to the New Federalism” but that “[n]oticeably absent from Justice Stevens’ majority opinion [in
statute in Raich involved a "concededly valid statutory scheme," whereas no such statutory scheme in the Gun-Free School Zone Act existed.93 The Court found that the Gun-Free School Zone Act involved no economic activity such that the possession of a gun did not have any "connection to past interstate activity or a predictable impact on future commercial activity."94 Moreover, the Court concluded that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."95 Furthermore, the Court found that those activities regulated by the CSA are "quintessentially economic" where "[e]conomics" refers to "the production, distribution, and consumption of commodities."96 As such, the Court found the CSA to be a statute that "regulates the production, distribution, and consumption of commodities for which there is an established, and lucrative, interstate market."97 In contrast, the Court in Lopez and later the Third Circuit in Rybar, found no economic component to the Gun-Free School Zone Act.98 Finally, that the marijuana at issue in Raich was being used for medicinal purposes did not diminish the economic nature of marijuana use because "most of the substances classified in the CSA have a useful and legitimate medical purpose."99 Thus, the Court distinguished the CSA from the Gun-Free School Zone Act, thereby preserving the precedential impact of Lopez.

Raich] were any references to federalism in general.... Instead, Justice Stevens treated the case as presenting a classic Commerce Clause problem.").

93. Raich, 545 U.S. at 23. The statutory scheme emerged after President Richard Nixon declared a "war on drugs" just after he took office in 1969. Id. at 10; see also Melissa T. Aoyagi, Beyond Punitive Prohibition: Liberalizing the Dialogue on International Drug Policy, 37 N.Y.U. J. Int'l L. & Pol. 555, 561 n.19 (2005) (explaining that the "war on drugs" concept originated with President Nixon). Prior to 1969, marijuana was first regulated in 1937 under the Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (repealed 1970). Instead of outlawing marijuana, the Tax Act "imposed registration and reporting requirements for all individuals importing, producing, selling, or dealing in marijuana" and thus "burdensome administrative requirements" existed for doctors wishing to prescribe marijuana for medical purposes. Raich, 545 U.S. at 11. Then, the federal drug control agencies were reorganized as follows: "The Bureau of Narcotics, then housed in the Department of Treasury, merged with the Bureau of Drug Abuse Control, then housed in the Department of Health, Education, and Welfare (HEW), to create the Bureau of Narcotics and Dangerous Drugs . . . ." Id. at 12. Finally, after the Marihuana Tax Act was overruled in Leary v. United States, 355 U.S. 6 (1969), Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970 that consisted of three titles: "Title I relates to the prevention and treatment of narcotic addicts through HEW (now the Department of Health and Human Services). Title II . . . addresses drug control and enforcement as administered by the Attorney General and the [Drug Enforcement Agency]. Title III concerns the import and export of controlled substances." Raich, 545 U.S at 12 & n.19. Title II, more commonly known as the CSA, was devised to "prevent the diversion of drugs from legitimate to illicit channels." Id. at 13 (citing United States v. Moore, 423 U.S. 122 (1975)).

94. Raich, 545 U.S. at 22-23. 95. Id. at 25 (quoting United States v. Morrison, 529 U.S. 598, 610 (2000)). 96. Id. at 25-26 (internal quotation marks omitted). 97. Id. at 26. 98. See infra Part II. 99. Raich, 545 U.S. at 27 (stating that if "the principal dissent contends[] the personal cultivation, possession, and use of marijuana for medicinal purposes is beyond the outer
As in *Lopez*, however, the Court in *Raich* was not in full agreement. Justice Antonin Scalia filed a concurrence, having determined that although he agreed with the majority, he believed his “understanding of the doctrinal foundation on which that holding rests is, if not inconsistent with that of the Court, at least [to be] more nuanced.” Justice Scalia noted that activities that substantially affect interstate commerce are not themselves part of interstate commerce and “the power to regulate them cannot come from the Commerce Clause alone.” He explained that Congress’s regulatory authority is also derived from the Necessary and Proper Clause of the Constitution. Moreover, he reasoned,

[T]he authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.

Justice Scalia went on to recognize the need to establish limitations on regulating noneconomic activity as established in *Lopez* and *Morrison*.

Further, Justice Scalia wrote that “although Congress’s authority to regulate intrastate activity that substantially affects interstate commerce is broad, it does not permit the Court to ‘pile inference upon inference,’ in order to establish that noneconomic activity has a substantial effect on interstate commerce.” Justice Scalia wrote that *Lopez* and *Morrison* “do not declare noneconomic intrastate activities to be categorically beyond the reach of the Federal Government” and that “[n]either case involved the power of Congress to exert control over intrastate activities in connection with a more comprehensive scheme of regulation.”

Finally, Justice Scalia emphasized that the Necessary and Proper Clause does not give the government carte blanche in regulating, writing that “even when the end is constitutional and legitimate, the means must be appropriate and plainly adapted to that end.” In applying these principles to the case at hand, Justice Scalia, usually viewed as a federalism advocate...
and thus a surprising member of the majority here,\textsuperscript{108} acknowledged that Congress certainly has the power under the Commerce Clause to extinguish the interstate market in Schedule I controlled substances (which include marijuana) and that what is important is “eradicating Schedule I substances from interstate commerce.”\textsuperscript{109} Justice Scalia agreed with the majority that marijuana for both medicinal and for personal use would never be “more than an instant from the interstate market.”\textsuperscript{110}

Justice Sandra Day O’Connor dissented from the majority in \textit{Raich}.\textsuperscript{111} Justice O’Connor wrote that “[o]ne of federalism’s chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\textsuperscript{112} Justice O’Connor was troubled by fact that

the Court[’]s sanction[] [of] an application of the federal Controlled Substances Act that extinguishes that experiment, without any proof that the personal cultivation, possession, and use of marijuana for medicinal purposes, if economic activity in the first place, has a substantial effect on interstate commerce and is therefore an appropriate subject of federal regulation.\textsuperscript{113}

Moreover, Justice O’Connor found the rule and the result “irreconcilable” with \textit{Lopez} and \textit{Morrison}.\textsuperscript{114} Justice O’Connor wrote that the majority’s holding implied “that the federal regulation of local activity is immune to Commerce Clause challenge because Congress chose to act with an ambitious, all-encompassing statute, rather than piecemeal.”\textsuperscript{115} Furthermore she concluded that “allowing Congress to set the terms of the constitutional debate in this way, that is, by packaging regulation of local activity in broader schemes, is tantamount to removing meaningful limits on the Commerce Clause.”\textsuperscript{116} Justice O’Connor wrote,

If the Court is right, then \textit{Lopez} stands for nothing more than a drafting guide: Congress should have described the relevant crime as transfer or possession of a firearm anywhere in the nation—thus including commercial and noncommercial activity, and clearly encompassing some activity with assuredly substantial effect on interstate commerce.\textsuperscript{117}

\textsuperscript{108} See supra notes 92, 100-06 and accompanying text.
\textsuperscript{109} \textit{Raich}, 545 U.S. at 40 (Scalia, J., concurring).
\textsuperscript{110} \textit{Id.} at 40.
\textsuperscript{111} \textit{Id.} at 42 (O’Connor, J., dissenting). Justices Rehnquist and Thomas joined Justice O’Connor in her dissent.
\textsuperscript{112} \textit{Id.} at 42 (internal quotation marks omitted); see also Linda Greenhouse, \textit{Justices Say U.S. May Prohibit the Use of Medical Marijuana}, N.Y. Times, June 7, 2005, at A21 (“As a prime mover of the court’s federalism revolution, Justice O’Connor did not hide her dismay in \textit{Raich}.”).
\textsuperscript{113} \textit{Raich}, 545 U.S. at 43 (O’Connor, J., dissenting).
\textsuperscript{114} \textit{Id.}
\textsuperscript{115} \textit{Id.} at 45.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 46 (internal quotation marks omitted).
Justice O'Connor went on to conclude that medicinal and non-medicinal use can properly be segregated and regulated differently. Further, from a more economic standpoint, Justice O'Connor found that "the homegrown cultivation and personal possession and use of marijuana for medicinal purposes has no apparent commercial character. Everyone agrees that the marijuana at issue in this case was never in the stream of commerce, and neither were the supplies for growing it." Believing that Wickard did not establish as far-reaching congressional control over activities as O'Connor thought the majority found Wickard to have established, she wrote that "Wickard did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress' reach." In a separate dissent, Justice Clarence Thomas added that "the question is whether Congress' legislation is essential to the regulation of interstate commerce itself—not whether the legislation extends only to economic activities that substantially affect interstate commerce" and that "[t]he majority's rewriting of the Commerce Clause seems to be rooted in the belief that, unless the Commerce Clause covers the entire web of human activity, Congress will be left powerless to regulate the national economy effectively." Moreover, from a federalism perspective, Justice Thomas wrote that "if Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."

Having discussed the evolution of the Supreme Court's approach to the Commerce Clause, Part II explores the conflict that emerged in the Third Circuit in United States v. Rybar.

II. TWO DIFFERENT PERSPECTIVES ON THE MACHINE GUN STATUTE

As highlighted by Raich, the Supreme Court maintained a consistent approach to Commerce Clause legislation as first enunciated in Lopez. After Lopez, but prior to Raich, a decision emerged from the Third Circuit, United States v. Rybar, which upheld a general congressional ban on machine guns. However, not every Third Circuit judge to preside over this case concurred. Judge Alito, now Justice Alito of the Supreme Court, adamantly dissented from this decision and found that his peers failed to accord proper deference to the Lopez decision. Section II.A dissects the majority's findings in Rybar and section II.B analyzes Judge Alito's contrasting approach.

118. Id. at 48 (citing 21 U.S.C. § 812 (2000)).
119. Id. at 50.
120. Id. at 51.
121. Id. at 67-70 (Thomas, J., dissenting).
122. Id. at 57-58.
123. See supra Part I.D.
124. See infra Part II.B.
A. The Majority’s Analysis

The Machine Gun Statute makes it “unlawful for any person to transfer or possess a machine gun.” The Machine Gun Statute was challenged in Rybar on constitutional grounds as an improper application of the Commerce Clause. Appellant Rybar argued that the statute was unconstitutional because it failed the substantial economic effects test under the Commerce Clause. Appellant also raised a federalism concern similar to the one raised in Lopez, arguing that such regulation was better left for states.

1. The Majority Found Lopez Distinguishable

In upholding the Machine Gun Statute, the Third Circuit majority distinguished the legislative process of both Rybar and Lopez. No legislative findings had existed to aid the Supreme Court in its analysis of Lopez. In Lopez, the Court acknowledged that legislative findings are not necessary to aid the Court in understanding the burden an activity has on interstate commerce. Nonetheless, the Court hinted that legislative findings would have been helpful. In Rybar, however, the Third Circuit was able to consider legislative findings regarding the Machine Gun Statute. Although legislative findings did not actually “accompany” the passage of the Machine Gun Statute itself, the legislative findings were “generated throughout Congress’ history of firearms regulation” and “link[ed] both the flow of

125. 18 U.S.C. § 922(o) (2000). A machine gun is defined as any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.


127. Id. at 277-78.

128. Id. at 278; see Antony Barone Kolenc, Commerce Clause Challenges After United States v. Lopez, 50 Fla. L. Rev. 867, 904 (1998) (“Making a federalism-based argument, Rybar contended that the Machine Gun Ban unduly infringed on Pennsylvania's machine gun laws.”); see also supra note 62 and accompanying text.


130. Id. at 563.

131. Id. (pointing out that “no such substantial effect was visible to the naked eye”); see also Jennifer L. Benedict, United States v. Morrison: Progressive Legislation is Down, But Not Out, 33 U. Tol. L. Rev. 411, 414 (2002) (acknowledging that “the Lopez Court suggested that the lack of legislative or congressional committee findings did influence its decision in Lopez”).

132. Rybar, 103 F.3d at 279.

133. Id. at 281; see also David B. Kopel & Glenn H. Reynolds, Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act, 30 Conn. L. Rev. 59, 84 n.103 (1997).
firearms across state lines and their consequential indiscriminate availability with the resulting violent criminal acts that are beyond the effective control of the states.\textsuperscript{134}

The majority found it convincing that the Machine Gun Statute did not "plow new ground" as had the statute at issue in \textit{Lopez}, and that possession of machine guns was a "national concern."\textsuperscript{135} To the contrary, the majority described the Machine Gun Statute as continuing "in the stream of prior legislation."\textsuperscript{136} Moreover, the court did not view the lack of express legislative findings as problematic in upholding the constitutionality of the Machine Gun Statute, since a long line of legislative findings for firearm legislation in general already existed.\textsuperscript{137} Historical legislative findings included the desire to control the widespread traffic in firearms.\textsuperscript{138} The legislation was intended to "halt unregulated mail-order and interstate consumer traffic in these weapons... and to insure that... weapons could not be obtained by individuals whose possession of them would be contrary to the public interest."\textsuperscript{139} Thus, the Third Circuit determined that a rational basis for the Machine Gun Statute could be inferred from Congress's rationale in banning the possession by felons of firearms.\textsuperscript{140}

In addition to distinguishing \textit{Lopez} on procedural grounds, the Third Circuit distinguished \textit{Rybar} from \textit{Lopez} on a more substantive level. The majority determined that the Gun-Free School Zone Act regulated possession of guns only inside school zones—a discrete area.\textsuperscript{141} The Machine Gun Statute, however, did "not limit[]... [the] possession 'of' ones own property," rather, "it regulates possession of... machine guns—

\begin{footnotes}
\textsuperscript{134} \textit{Rybar}, 103 F.3d at 279.
\textsuperscript{135} Id. at 279-81.
\textsuperscript{136} Id. at 279.
\textsuperscript{137} Id. at 281; see, e.g., H.R. Rep. No. 99-495, at 2, 7 (1986), as reprinted in 1986 U.S.C.C.A.N. 1327, 1328, 1333 (finding the proposed machine gun restrictions as "benefits for law enforcement" and emphasizing "the need for more effective protection of law enforcement officers from the proliferation of machine guns").
\textsuperscript{138} \textit{Rybar}, 103 F.3d at 282 (citations omitted).
\textsuperscript{139} Id. (internal quotation marks omitted).
\textsuperscript{140} Id. (stating that firearm possession presented a "burden on commerce or threat affecting the free flow of commerce" (citation omitted)).
\textsuperscript{141} Id.; see also Benedict, supra note 131, at 415 (discussing the lack of a jurisdictional element in the Gun-Free School Zone Act); Grant S. Nelson & Robert J. Pushaw, Jr., \textit{Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues}, 85 Iowa L. Rev. 1, 88 (1999) (describing the \textit{Lopez} majority to have "stressed that gun possession in a school zone was not intrastate economic activity that might, through repetition elsewhere, have a substantial effect on interstate commerce"); Jon S. Vernick & Stephen P. Teret, \textit{New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws}, 36 Hous. L. Rev. 1713, 1726 (1999) ("Lopez-based challenges by felons and juveniles convicted of unlawful firearm possession under the Gun Control Act have been unavailing. Each of these provisions contains a jurisdictional element requiring some nexus with interstate commerce, a missing factor mentioned by the \textit{Lopez} Court."); supra note 76 and accompanying text.
\end{footnotes}
in a much more dispersed and extensive area.” Moreover, “Congress could reasonably have concluded that such a general ban of possession of machine guns [would] have a meaningful effect on interstate commerce that would be more substantial than the effect of banning possession within school zones.”

In addition to finding the statutory language in Rybar distinguishable from the statutory language in Lopez, the court in Rybar actually found a strong economic link between possession of a machine gun and interstate commerce. Recall that the Court in Lopez had been unable to find a link between carrying a gun into a school zone and the interstate economy. In contrast, in Rybar, the Third Circuit was unimpressed by the argument that the transfer of machine guns is a wholly intrastate activity. Rather, the court cited cases such as Wickard, Heart of Atlanta Motel v. United States, and Perez for the proposition that it is the cumulative effect on interstate commerce that is of ultimate significance. Finally, unlike the Third Circuit in Rybar, the Court in Lopez was concerned that in passing the Gun-Free School Zone Act, Congress was intruding into the regulation of local schools, “an area traditionally left for the overview and regulation by states.”

2. The Majority Relied on Other Circuits that Upheld the Machine Gun Statute

The Third Circuit was not the first circuit to consider and uphold the constitutionality of the Machine Gun Statute. The Seventh Circuit similarly upheld the constitutionality of the Machine Gun statute, finding the statute more analogous to the “wheat-growing scheme in Wickard or the anti-loansharking law in Perez than the Gun-Free School Zone Act in Lopez.”

142. Rybar, 103 F.3d at 282 (quoting Rybar, 103 F.3d at 291 (Alito, J., dissenting)); see also Adrian Vermeule, Does Commerce Clause Review Have Perverse Effects?, 46 Vill. L. Rev. 1325, 1335 (2001) (“This is the perverse effect of the aggregation principle: broaden the statute’s reach and there are more applications to aggregate, until the bar of the substantial-effects test has been cleared.”).
143. Rybar, 103 F.3d at 282.
144. Id.
146. Rybar, 103 F.3d at 282; see also supra Part I.A.
147. Rybar, 103 F.3d at 276, 282-83 (reminding the judiciary that it is also possible to uphold the constitutionality of the statute under the Commerce Clause as a regulation of channels and instrumentalities); see supra Part I.B.
148. Rybar, 103 F.3d at 282.
149. Vernick & Teret, supra note 141, at 1725-26 & 1725 n.86 (citing several cases upholding the constitutionality of the Machine Gun Statute).
150. Rybar, 103 F.3d at 283 (citing United States v. Kenney, 91 F.3d 884, 889 (7th Cir. 1996)); see also supra Part I.B (establishing that the statutes in Wickard and Perez were upheld).
Other circuits upheld the constitutionality of the statute, but on different grounds. The Fifth, Sixth, and Ninth Circuits viewed the Machine Gun Statute as a regulation of "the use of the channels of interstate commerce." The Third Circuit summarized the Fifth Circuit's holdings as concluding that the statute applies only to machine guns "not lawfully possessed before May 1986, and thus functioned principally to prohibit 'the introduction into the stream of commerce [of] machineguns' illegally obtained after that date." The Ninth Circuit "echo[ed]" the analysis in United States v. Kirk in upholding the constitutionality of the Machine Gun Statute by stating "there could be no unlawful possession without first an unlawful transfer... [and thus] regulation of possession 'regulates commerce' itself." The Sixth Circuit in United States v. Beuckelaere described the statute as regulating "the extensive, intricate, and definitely national market for machineguns."

The Tenth Circuit upheld the constitutionality of the Machine Gun Statute on the grounds that commodities are "bound up with interstate attributes" and distinguished from the "purely intrastate" objects of the statute's prohibition. Moreover, the Tenth Circuit held that the Machine Gun Statute was consistent with earlier firearms legislation "because it merely regulates the movement of a particular firearm in interstate commerce." Although each of these circuits applied different reasoning, the Third Circuit majority rationalized that "[w]hatever the category relied on, it is telling that each of our sister circuits has found that the regulation of machine gun transfer and possession comes within Congress' power to legislate under the Commerce Clause," and that "Lopez has raised many false hopes" as "challenges based on Lopez [a]lmost invariably fail."

By distinguishing from Lopez the Machine Gun Statute on procedural and substantive grounds and relying on sister court theories, the Third Circuit majority rationalized that "[w]hatever the category relied on, it is telling that each of our sister circuits has found that the regulation of machine gun transfer and possession comes within Congress' power to legislate under the Commerce Clause," and that "Lopez has raised many false hopes" as "challenges based on Lopez [a]lmost invariably fail."

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151. Id. at 284 (quoting United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996)); see United States v. Rambo, 74 F.3d 948 (9th Cir. 1996); United States v. Kirk, 70 F.3d 791 (5th Cir. 1995).
152. Id. (quoting Kirk, 70 F.3d at 796). Dissenting from the majority in Kirk, Judge Edith Jones found that the only possible justification for the upholding of the Machine Gun Statute was evaluating the statute under the substantial economic effect test, not under the channels test as "espoused by the majority." Kirk, 70 F.3d at 801 (Jones, J., dissenting). Yet, Judge Jones found that the Machine Gun Statute lacked a "jurisdictional element" and accordingly "[a]s in Lopez, the possession of a machine gun covered by Section 922(o), without more, is no more an economic activity that may substantially affect commerce than was the possession of a firearm in a school zone prohibited by Section 922(q)." Id. at 801-02.
153. Rybar, 103 F.3d at 284 (citing Rambo, 74 U.S. at 951-52).
154. Id. (citing Beuckelaere, 91 F.3d at 784). In Beuckelaere, Judge Richard Suhrheinrich found that the majority should have considered the Machine Gun Statute under the substantial economic effect test but that the Machine Gun Statute lacked "a concrete tie to interstate commerce." Beuckelaere, 91 F.3d at 788 (Suhrheinrich, J., dissenting).
155. United States v. Wilks, 58 F.3d 1518, 1521 (10th Cir. 1995).
156. Id. at 1521 n.4.
157. Rybar, 103 F.3d at 284-85 (internal quotation marks omitted and alterations in original).
Circuit concluded that the Machine Gun Statute was constitutional. Through his dissent, as discussed in Part II.B, Judge Alito expressed strong disagreement.

B. Judge Alito's Dissent

Judge Alito began his dissent in *Rybar* by asking, "Was [Lopez] a constitutional freak? Or did it signify that the Commerce Clause still imposes some meaningful limits on congressional power?"\(^{158}\) Troubled by the reasoning of the majority, Judge Alito did not find enough of a difference between the Machine Gun Statute and the Gun-Free School Zone Act to have upheld the former's constitutionality in *Rybar*.\(^{159}\) Judge Alito, who "dissent[ed] slightly more often than the typical appeals court judge,"\(^{160}\) asserted several general reasons why the Machine Gun Statute should be held unconstitutional. First, Judge Alito's dissent stated that both the Gun-Free School Zone Act and the Machine Gun Statute similarly lack a jurisdictional element in that "they do not require federal prosecutors to prove that the firearms were possessed in or affecting interstate commerce."\(^{161}\) Second, Judge Alito stated that "in passing both statutes, Congress made no findings regarding the link between the intrastate activity regulated by these laws and interstate commerce," and that it is unreasonable to confine *Lopez* to its own "peculiar circumstances."\(^{162}\) Part II.B.1-2 explores Judge Alito's reasoning.

1. Judge Alito Rules Out Channels and Instrumentalities

Before addressing what he believed to be the majority's "two separate theories"\(^{163}\) for upholding the Machine Gun Statute, Judge Alito first addressed whether the Machine Gun Statute regulated channels or instrumentalities of interstate commerce. Judge Alito concluded that the

\(^{158}\) Id. at 286 (Alito, J., dissenting); see Dean A. Strang, *Felons, Guns, and the Limits of Federal Power*, 39 J. Marshall L. Rev. 385, 398 (2006) ("Perhaps because the Supreme Court split 5-4 in *Lopez*, most federal appellate judges have treated that decision as a 'constitutional freak,' to repeat Judge Samuel A. Alito's colorful term.").

\(^{159}\) *Rybar*, 103 F.3d at 286-87 (Alito, J., dissenting). Some commentators have agreed with Judge Alito's rationale in finding the similarities between *Lopez* and *Rybar* to be striking. See Debbie Ellis, *A Lopez Legacy?: The Federalism Debate Renewed, But Not Resolved*, 17 N. Ill. U. L. Rev. 85, 113-14 (1996) ("Both [the Machine Gun Statute and the Gun-Free School Zone Act] are criminal statutes which regulate the purely intrastate possession of guns, both lack jurisdictional elements, and Congress made no findings regarding the link between the intrastate activity, possession, and interstate commerce."); see also Carhart, supra note 82, at 864 (discussing the fact that some commentators have found *Lopez* and *Rybar* to have similarities).


\(^{161}\) *Rybar*, 103 F.3d at 287 (Alito, J., dissenting); see supra note 152 (establishing that Judge Jones in the U.S. Court of Appeals for the Fifth Circuit came to a similar conclusion in her dissent).

\(^{162}\) *Rybar*, 103 F.3d at 287 (Alito, J., dissenting).

\(^{163}\) Id. at 291; see infra Part II.B.2.a-b.
Machine Gun Statute did not regulate the channels or instrumentalities of interstate commerce.\textsuperscript{164} He wrote that the circuits that upheld the statute on such grounds “fundamentally misunderstood the first category set out in \textit{Lopez}.”\textsuperscript{165} Judge Alito concluded that to justify the statute on the grounds that Congress is regulating channels of commerce, Congress would have to have regulated, “for economic or social purposes, the passage in interstate commerce of either people or goods.”\textsuperscript{166} Moreover, Judge Alito believed that the Machine Gun Statute would “fall within this category if it barred the interstate shipment of machine guns, but of course that is not what it does.”\textsuperscript{167} Rather, according to Judge Alito, the statute “goes much farther and reaches the wholly intrastate possession of machine guns.”\textsuperscript{168}

Judge Alito additionally expressed concern with the reasoning asserted by the Fifth, Sixth, and Ninth Circuits that “‘there could be no unlawful possession under [the Machine Gun Statute] without an unlawful transfer.’”\textsuperscript{169} First, he argued that a semi-automatic weapon could be converted by its owner into an automatic weapon.\textsuperscript{170} Moreover, a person could have lawfully possessed a gun under 18 U.S.C. § 922(o), which permits possession under governmental authority “but then exceeds the scope of that authority or retains possession after it has terminated.”\textsuperscript{171} Such a transfer could be wholly confined to intrastate activities without extending to interstate activities.\textsuperscript{172} Finally, Judge Alito wrote that the arguments made by the Fifth, Sixth, and Ninth Circuits were more in line with the third category established in \textit{Lopez} because they describe activities that, although intrastate, have an impact on interstate activities.\textsuperscript{173}

Judge Alito summarized instrumentalities of interstate commerce as “the means of conveying people and goods across state lines, such as airplanes and trains. This power also reaches threats to people and goods travelling in interstate commerce, such [as] . . . the setting of rates that could affect interstate trade.”\textsuperscript{174} Moreover, Judge Alito wrote that the Machine Gun Statute would not fall within this category even if Congress “had banned

\textsuperscript{164} See \textit{Rybar}, 103 F.3d at 291-94 (Alito, J., dissenting). Although Judge Alito agreed with the majority’s focus on the substantial economic effects, he still addressed the other two categories (channels and instrumentalities of commerce) since the majority rationalized the overall constitutionality of the statute in part because other circuits have justified the statute under those two categories. \textit{Id.}

\textsuperscript{165} \textit{Id.} at 288; see also supra note 45 and accompanying text (describing the three categories).

\textsuperscript{166} \textit{Rybar}, 103 F.3d at 288-89 (Alito, J., dissenting).

\textsuperscript{167} \textit{Id.} at 289.

\textsuperscript{168} \textit{Id.}

\textsuperscript{169} \textit{Id.} (quoting United States v. Kirk, 70 F.3d 791, 769 (5th Cir. 1995)); see also United States v. Beuckelaere, 91 F.3d 781 (6th Cir. 1996); United States v. Rambo, 74 F.3d 948 (9th Cir. 1996); \textit{Kirk}, 70 F.3d 791; supra notes 151-54 and accompanying text.

\textsuperscript{170} \textit{Rybar}, 103 F.3d at 289 (Alito, J., dissenting) (citing United States v. Kenney, 91 F.3d 884, 889 (7th Cir. 1996)).

\textsuperscript{171} \textit{Id.}

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.}; see also supra note 45 and accompanying text.

\textsuperscript{174} \textit{Rybar}, 103 F.3d at 290 (Alito, J., dissenting).
the intrastate possession of machine guns in order to prevent them from being used to damage vehicles travelling interstate, to carry out robberies of goods moving in interstate commerce, or to threaten or harm interstate travellers. 175

Judge Alito found the reasoning of the Sixth and Tenth Circuits “elusive” in terms of finding the statute to be constitutional under this instrumentality category. 176 Both circuits described the inherent interstate component of machine gun travel. 177 Confused by how machine gun travel inherently encompasses interstate travel, Judge Alito summarily wrote that “machine guns that are simply possessed intrastate and are not travelling in interstate commerce may not be regulated under the first Lopez category, and as previously explained, unless they are menacing interstate commerce, they do not fall within the second category either.” 178

2. Judge Alito Agrees that Machine Guns Fall Within the Category of Substantially Affecting Interstate Commerce

Finally, Judge Alito addressed the third category—activities that substantially affect interstate commerce. The majority of Judge Alito’s own Third Circuit panel relied upon this third category to sustain the constitutionality of the Machine Gun Statute. 179 Additionally, Judge Alito conceded that this category was the most promising of all three categories. 180 He nevertheless could not sufficiently distinguish the Machine Gun Statute from Gun-Free School Zone Act to warrant the Rybar majority’s finding of constitutionality under the Commerce Clause. 181 Part II.B.2.a-b discuss the two theories advanced by the majority, as postulated by Judge Alito himself, and why Judge Alito found both theories troubling.


Judge Alito addressed what he believed to be the majority’s first argument that “the private, purely intrastate possession of machine guns has a substantial effect on the interstate machine gun market.” 183 Troubled by this concept, Judge Alito wrote that if machine guns fell within Congress’s authority, such a theory would go so far as to “convert[] Congress’
authority to regulate interstate commerce into a plenary police power.”

Moreover, Judge Alito wrote “that it is safe to assume that there is some sort of interstate market for practically everything—that the purely intrastate possession of that item will have an effect on that market, and outlawing private possession of the item will presumably have a substantial effect.” Judge Alito interpreted Lopez to mean that the Supreme Court did not consider possession of a gun in a school zone to be economic activity the way possession of wheat intended wholly for home consumption was in Wickard. Judge Alito then determined that possession of a machine gun could not possibly be economic activity if possession of a gun in a school zone was ruled not to be.

b. Second Theory: Purely Intrastate Possession of Machine Guns Increases Crime at a National Level

Judge Alito believed the majority’s second theory to be that Congress had a rational basis for concluding that “the purely intrastate possession of machine guns increases the incidence of certain crimes” on a national level sufficiently to warrant congressional control of intrastate possession of machine guns. Moreover, Judge Alito wrote that he thought the majority to believe that

[i]n order to bring this case within the third Lopez category, it is not enough to observe that violent criminals, racketeers, and drug traffickers occasionally use machine guns in committing their crimes and that these crimes have interstate effects. Rather, there must be a reasonable basis for concluding that the regulated activity (the purely intrastate possession of machine guns) facilitates the commission of these crimes to such a degree as to have a substantial effect on interstate commerce.

Yet, Judge Alito found that no “empirical proof” existed to draw a link between intrastate possession of a machine gun, national crime, and interstate commerce. In this part of his dissent, Judge Alito conceded that the interstate flow of machine guns would impact interstate commerce, but was troubled by the leap that the courts made in finding that intrastate possession of machine guns could also have such an impact on interstate commerce. Judge Alito was also troubled that when Congress made its finding regarding guns in general, Congress “had no occasion” to consider

184. Id. (internal quotation marks omitted).
185. Id.
186. Id.
187. Id.; see also Kopel & Reynolds, supra note 133, at 84 n.103 (“[T]he possession of a machine gun on one’s property has no more genuine connection with interstate commerce or commerce of any sort than does possession of a gun within a school zone.” (citing Rybar, 103 F.3d at 291 (Alito, J., dissenting))).
188. Rybar, 103 F.3d at 292 (Alito, J., dissenting).
189. Id.
190. Id.
191. Id. at 292-93.
whether intrastate possession of a machine gun would impact interstate commerce. But more importantly, "none of the laws in connection with which those findings [for weapons in general] were made reached purely intrastate possession without requiring proof in court of a jurisdictional link." Judge Alito thus determined that the Third Circuit needed "at least some empirical support before [it] sustain[ed] a novel law that effects 'a significant change in the sensitive relation between federal and state criminal jurisdiction.'"

C. Political Considerations

In addition to Judge Alito's interpretation of legal precedent, political considerations may have played into Judge Alito's decision. For example, although Justice Scalia concurred in Raich, some have speculated that his feelings toward the war on drugs colored his overall opinion. Moreover, both Justices Thomas and Scalia have supported movements away from gun control legislation. Additionally, although the "reasoning in Judge Samuel A. Alito Jr.'s decisions is mostly methodical, dry and respectful of precedent, . . . the technical quality of his writing can mask bold and solidly conservative conclusions on issues like abortion, gun control and the death penalty." While the decisions at issue focused for the most part on the Commerce Clause, considering Judge Alito's and his colleagues' political leanings may enlighten the public on other reasons beyond legal precedent that may factor into judicial outcomes.

III. THE MAJORITY IN RYBAR CORRECTLY INTERPRETED COMMERCE CLAUSE JURISPRUDENCE

A. Judge Alito Was Misguided

Although Judge Alito raised some interesting points, his opinion that Rybar was analogous to Lopez was rightfully rejected by his fellow Third Circuit judges. On a broad level, Judge Alito has been criticized for letting his loyalty to federalism get the better of him in Rybar. More
specifically, however, both of Judge Alito’s arguments against upholding the Machine Gun Statute were faulty. The next section addresses the weaknesses of Judge Alito’s criticisms of what he believed to be the majority’s two main theories.199

1. Judge’s Alito’s Criticism of the Majority’s First Theory Was Problematic

In trying to diminish what he believed to be the majority’s first argument,200 Judge Alito focused on a common factor between Lopez and Rybar—that both statutes at issue involved possession of a firearm—instead of focusing on the actual nature of the possession of that firearm in each situation.201 Judge Alito concluded that because both statutes involve firearms, neither involved an economic activity.202

While it is indisputable that both statutes involved firearms, Judge Alito failed to consider properly the fact that the Gun-Free School Zone Act regulated possession of a weapon in a discrete area that was decidedly noneconomic.203 Judge Alito was incorrect in concluding that the Machine Gun Statute involves as noneconomic an activity as possession of a gun in a school zone.

Judge Alito found the distinction between possessing a gun in a school zone and general possession too “subtle for [him] to grasp.”204 But, to dismiss possession of a machine gun as noneconomic simply because the distinction is subtle does not mean that no distinction exists. The reasoning in United States v. Lopez was itself complicated and based on subtle distinctions.205 What was so significant about Lopez was that after years of judicial deference to congressional legislation, the Court finally found a subtle enough distinction to conclude that the link to interstate commerce was simply too tenuous to support the legislation.206 Yet the Court in Lopez never suggested that future statutes would be held to any less of a standard and that simple subject matter similarities (such as statutes involving firearms) would warrant overturning legislation. Judge Alito’s conclusion that the statute must be overturned merely because the differences in the statute are too “subtle” is hardly convincing.

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199. This section will not address Judge Alito’s findings regarding instrumentalities and channels because there is not a controversy surrounding these two Commerce Clause categories. See supra Part II.B.1.
200. See supra Part II.B.2.a.
201. See supra Part II.B.2.a.
202. See supra Part II.B.2.a.
203. See supra note 76 and accompanying text.
206. See supra note 61 and accompanying text.
Furthermore, Judge Alito’s conclusion that possession of a machine gun was just as noneconomic as possession of a gun in a school zone is similarly weak.\textsuperscript{207} Judge Alito wrote,

The activity that the \textit{Lopez} Court found was not “economic” or “connected with a commercial transaction” was a type of intrastate firearm possession, i.e., the possession of a firearm (including a machine gun) within a school zone. At issue here is another type of purely intrastate firearm possession, i.e., the purely intrastate possession of a machine gun. If the former must be regarded as non-economic and non-commercial, why isn’t the same true of the latter . . . . [Furthermore,] the most natural reading of \textit{Lopez} is that the simple possession of a firearm, without more, is not “economic” or “commercial” activity in the same sense as the production of wheat in \textit{Wickard} and that therefore such possession cannot be regulated under the \textit{Wickard} theory.\textsuperscript{208}

The Supreme Court itself, however, set forth its own “true” reading of \textit{Lopez} in \textit{Morrison}: “[A] fair reading of \textit{Lopez} shows that the noneconomic, criminal nature of the conduct at issue was central to [the Court’s] decision in that case” because “possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.”\textsuperscript{209}

Thus, the noneconomic aspect of the Gun-Free School Zone Act was not just about the “simple possession of a firearm” as suggested by Judge Alito, but rather only the possession of a firearm in a discrete area, such as a school zone, which was not viewed as a venue for economic activity. Moreover, possession of a machine gun is economic activity with a connection to interstate commerce because, “in many situations possession [of a machine gun] would result only from an unlawful transfer, and Congress could have reasonably concluded that possession of machine guns could stimulate demand for machine guns, resulting in more illicit transfers of them.”\textsuperscript{210} The Machine Gun Statute broadly precludes any possession; thus, the activity of buying and selling machine guns effortlessly fits into such a definition.\textsuperscript{211} Simply possessing a gun in a school zone does not necessarily include the buying and selling of such a gun.\textsuperscript{212} Possession of a gun in a school zone is limited to the activity of holding a gun in one’s control or custody in and around a school.\textsuperscript{213} While a purchase and/or sale of that gun may have led to such possession, the Gun-Free School Zone Act does not explicitly address such transfers.

\textsuperscript{207} \textit{See supra} Part II.B.2.a.

\textsuperscript{208} \textit{Rybar}, 103 F.3d at 291-92.


\textsuperscript{211} \textit{See supra} note 125 and accompanying text.

\textsuperscript{212} \textit{See supra} text accompanying notes 58-59.

\textsuperscript{213} \textit{See supra} text accompanying notes 58-59.
Finally, had the Machine Gun Statute been limited, for example, to "possession in a place of worship," perhaps Judge Alito's rationale that the Machine Gun Statute is unconstitutional would have been workable, since the scope would be as limited as in the Gun-Free School Zone Act. Instead, by focusing on the connection that both statutes involve noneconomic firearms, Judge Alito tenuously applied the *Lopez* holding to *Rybar* and was rightly outnumbered by his fellow Third Circuit judges.214 While Judge Alito may have been somewhat justified in finding that all firearms deserve similar treatment under the law, that is a matter of legislative judgment in the first instance; and, in any event, Congress cannot simply legislate without properly considering the limits of the Commerce Clause.215

2. Judge Alito's Criticism of the Majority's Second Theory Was Also Problematic

Judge Alito's second attempt to challenge the basis of the majority's opinion in *Rybar* was just as troubling as his first challenge.216 Judge Alito relied on the rationale in *United States v. Bass* that seemingly required some evidence linking the underlying activity to interstate commerce.217 However, while *Bass* required a "demonstrated nexus" and Congressional "language that is clear and definite," the Court in *Bass* did not actually require empirical data to demonstrate that nexus.218

Moreover, in enacting the Machine Gun Statute, Congress focused on the need to control firearms because possession of a machine gun (while possibly only intrastate) could instigate crimes in the home state or across the border.219 Additionally, earlier Commerce Clause precedent, such as *Wickard* and *Lopez*, upon which Judge Alito so heavily relied,220 does not support requiring Congress to demonstrate the nexus more than it already had done by looking at the historical evolution and the need for federal firearm statutes to prevent criminal activity.221 While the Court in *Lopez* considered legislative findings helpful, the Court did not deem such findings dispositive,222 suggesting that Judge Alito's demand for empirical support would not survive Supreme Court scrutiny. As such, firearms that have a clear economic component and have a strong enough link to

215. *See* Christie, *supra* note 15, at 979 (underscoring the importance of proper deference to Congress when legislating under the Commerce Clause).
216. *See supra* Part II.B.2.b.
217. United States v. Bass, 404 U.S. 336, 349 (1971) (stating that the Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction").
218. *Id.* at 349.
219. *See* Rybar, 103 F.3d at 282.
220. *Id.* at 282-83.
221. *See supra* Part II.B-C.
222. *See supra* notes 130-31 and accompanying text.
interstate commerce are subject to congressional legislation even though the statute may lack empirical support.223

Not surprisingly, the Supreme Court denied certiorari in Rybar despite Judge Alito’s vigorous dissent.224 However, with two new Justices on the Supreme Court, one of whom is Justice Alito, and an opinion such as Gonzales v. Raich in place, considering the possible outcome of a challenge to the Machine Gun Statute, should it ever reach the Supreme Court, is worthwhile. Part III.B evaluates the current composition of the Supreme Court and what, if anything, the future may hold for the Machine Gun Statute.

B. What If the Supreme Court Granted Certiorari on the Machine Gun Statute?

1. Justice Alito’s Likely Position on Raich

Since Justice Alito is now a Supreme Court Justice and Raich was the most recent Commerce Clause case, Justice Alito’s potential views on Raich are somewhat predictable. Justice Alito often has been compared to Justice O’Connor, whose seat he was appointed to fill.225 In her dissent in Raich, Justice O’Connor expressed a concern similar to the one Judge Alito expressed in Rybar, regarding the lack of evidence to provide the link between the act in question and interstate commerce.226 Moreover, Justice O’Connor did not find the fact that the CSA involved a comprehensive statutory scheme (similar to the machine gun statute) to be dispositive and concluded that medicinal use of marijuana could be separated from non-medicinal use.227 This reasoning is similar to that of then-Judge Alito in Rybar, who was not impressed by the history of the Machine Gun Statute’s statutory scheme.228 Judge Alito had emphasized his frustration with Congress’s lack of investigation and proof regarding the link between interstate commerce and the act in controversy.229 He wrote,

[T]he majority cite[ed] congressional findings made in connection with prior firearms legislation concerning the problems resulting from the interstate movement of firearms . . . . However, the question here is not whether the interstate flow of firearms substantially affects interstate commerce; rather, the question is whether the entirely intrastate possession of machine guns has such an effect, and none of the findings

223. See supra Part II.
225. See Lewis, supra note 198, at 28 (“Although the dissent [in Rybar] appears to place Judge Alito in the conservative camp that is trying to reshape Congressional [sic] authority and the relationship with the states, it puts him generally in line with the record of Justice Sandra Day O’Connor, whom he [succeeded].”)
226. See supra notes 111-20 and accompanying text.
227. See supra notes 111-20 and accompanying text.
228. See supra Part II.B.
229. See supra Part II.B.
noted above speak to that question. Indeed, Congress had no occasion to consider that question when it made those findings, since none of the laws in connection with which those findings were made reached purely intrastate possession without requiring proof in court of a jurisdictional link.230

Clearly, both then-Judge Alito and Justice O'Connor demanded more than just a comprehensive statutory scheme for a statute to pass muster under the Commerce Clause. Both wanted proof of a nexus to commerce of the particular statute in question and refused to rely on history.231 Thus, Justice Alito likely would not have joined the majority in *Raich*, but rather would have dissented, as did Justice O'Connor.

Finally, while commentators have focused on the similarities between Justice Scalia, who concurred with the majority in *Raich*,232 and Justice Alito,233 Justices Alito and Scalia do have significant differences.234 Arguably, one major difference is their take on federalism.235 Because Justice Alito has been recognized for favoring regulation by states over the federal government, whereas Justice Scalia has been recognized sometimes to favor federal regulation, Justice Alito would likely not have voted with the majority to uphold the CSA in *Raich*.236 Thus, from a federalism perspective, it is fairly clear that Justice Alito would not have signed on with the majority in *Raich*.

2. The Supreme Court Would Likely Uphold the Machine Gun Statute

a. The Precedent Clearly Favors Upholding the Machine Gun Statute

Even though Justice Alito would likely have dissented in *Raich*, since the majority in *Raich* found the CSA as a whole to be constitutional, the

231. See supra notes 111-20, 192-94 and accompanying text.
232. See supra note 100 and accompanying text.
234. See id. For example, "[i]n sharp contrast to Scalia, Alito has often voted in favor of the free exercise rights of minority religious groups, even against laws that are not deliberately intended to harm minority religions." Id. See, for example, *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999), where Alito "joined an opinion holding that Muslim police officers had a right to grow beards (as required by their religion) so long as the city allowed a secular health-related exemption from its no-beard policy." Somin, supra note 233. But see *Employment Division v. Smith*, 494 U.S. 872 (1990), where Justice Scalia "wrote a decision holding that the Constitution in most cases does not protect religious groups against the effects of 'neutral' laws." Somin, supra note 233.
235. See Smith, 494 U.S. 872; see also, Somin supra note 233.
236. See Somin, supra note 233 ("Alito's position differs from Scalia's recent opinion in *Gonzales v. Raich*, where the Justice argued that the commerce power justified upholding a federal ban on the possession of marijuana, even for noncommercial medical purposes permitted under state law.").
Supreme Court would likely uphold the constitutionality of the Machine Gun Statute if the Court were to grant certiorari on a case raising the issue. The Machine Gun Statute regulates transfer and possession of machine guns in interstate commerce. In Rybar, Judge Alito was skeptical about the idea that personal possession of a machine gun could possibly impact interstate commerce more than possession of a gun in a school zone. Both the majority and concurring Justices in Raich, however, found no issue with Congress regulating possession of noneconomic activities as long as interstate commerce is ultimately affected.

Moreover, both the majority and the concurring opinion in Raich did not find that Lopez presented any impediment to upholding the statute. Both the majority and concurrence agreed that Lopez involved regulation of guns in discrete areas where no economic link existed between possession of such guns and interstate commerce so as to warrant federal regulation. Yet, both the majority and concurrence in Raich agreed that the CSA was unlike the Gun-Free School Zone Act in that general possession of marijuana could impact interstate commerce. Thus, the majority of the current Supreme Court would likely agree that the Machine Gun Statute, like the CSA, does not limit its scope to noneconomic venues such as school zones. This translates into the somewhat surprising notion that the broader the legislation, the more likely the legislation will withstand Supreme Court scrutiny under the Commerce Clause.

b. The CSA and the Machine Gun Statute Share Several Similarities

As noted above, both the Machine Gun Statute and the CSA are part of larger comprehensive regulatory schemes that have been upheld as constitutional over the years. While such a comprehensive scheme is not dispositive, it is highly influential on the outcome of Commerce Clause challenges, as demonstrated by the Supreme Court in Raich and by multiple circuits, such as the Third Circuit in Rybar. To declare statutes unconstitutional where there has been large legislative commitment seems unlikely; yet as proven in Lopez, if the link to interstate commerce is found

237. See supra notes 125 and accompanying text.
238. See supra Part II.B.
239. See supra Part I.D.
240. See supra Part I.D (acknowledging that the majority and concurrence in Raich came to the conclusion that the CSA should be upheld but on different grounds).
241. See supra Part I.D.
242. See supra Part I.D.
243. See supra Part I.D.
244. See supra notes 81-82, 93, 132-40 and accompanying text.
245. See supra notes 81-82, 93, 132-40 and accompanying text.
to be too tenuous, such statutes will likely not be upheld. Moreover, both possession of marijuana and possession of a machine gun could arguably have beneficial purposes, while both have been linked to dangerous activities directly and indirectly. Finally, both the Machine Gun Statute and the CSA were written broadly to encompass all possession, thereby eliminating the necessity to draw tenuous links to interstate commerce. Both statutes are thus quite distinguishable from the Gun-Free School Zone Act, where the possession was limited to school zones.

c. The Current Composition of the Supreme Court Is Telling, Though Not Conclusive

The current makeup of the Supreme Court is obviously different than it was at the time of Raich. Moreover, federalism concerns have tended to impact some of the Justices’ opinions. Justices Breyer, Stevens, David Souter, and Ruth Bader Ginsburg all dissented from Lopez, but all were either part of the majority or concurrence in Raich, suggesting they might support broadly construing Congress’s power to legislate under the Commerce Clause. Justice Scalia joined the majority in Lopez but surprisingly concurred in Raich and thus is seemingly unpredictable when it comes to federal legislation. Justice Anthony Kennedy joined the majority in both Lopez and Raich, but similar to Justice Scalia, has often voted for state power over congressional power.

Two out of the three Raich dissenters, the late Chief Justice William Rehnquist and Justice O’Connor, have been replaced by Chief Justice John G. Roberts and Justice Alito. Justice Thomas, who dissented in Raich, would likely find the Machine Gun Statute troubling due to his “originalist” approach to Commerce Clause legislation, his pro federalism tendencies, and his concurring opinion in Lopez. Justice Alito’s opinion regarding the Machine Gun Statute, assuming it remains unchanged, is quite clear from his dissent in Rybar. Chief Justice Roberts’s views on this subject,

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246. See supra note 61 and accompanying text.
247. Different beneficial purposes may include using marijuana medicinally or possessing a gun for self-protection.
248. See supra Parts I.D, II.A.
249. See supra note 76 and accompanying text.
250. See supra Part I.D.
251. See Claeys, supra note 195, at 815 (“Raich makes clear that Scalia will side with the nationalists in the unlikely event that the Court entertains Commerce Clause challenges to other federal schemes that regulate local activities on the pretense of guaranteeing certain consequences for interstate trade.”). Compare id., with Greenhouse, supra note 112 (noting that Scalia has “over the past decade . . . voted with [the] majority [in] a series of decisions curbing Congressional power and elevating the role of the states within the federal system”).
252. See Greenhouse, supra note 100 (“The surprise was . . . that Justice Kennedy and Scalia defected from their usual states’ rights allies to vote to uphold federal power.”).
253. See Claeys, supra note 195, at 812-15; see also supra notes 121-22, 196 and accompanying text.
254. See supra Part II.B.
however, are not quite as pronounced. Chief Justice Roberts did support a Commerce Clause challenge as a circuit judge, suggesting he might be critical to federal legislation.\textsuperscript{255} Moreover, Chief Justice Roberts has similarly been considered a federalist.\textsuperscript{256}

The Justices’ prior views on \textit{Lopez} and \textit{Raich} and their typical stances on federalism are hardly dispositive, however. There is a chance that political considerations and personal feelings towards other issues could also impact each Justice’s outlook—after all, medicinal use of marijuana and possession of a machine gun draw vastly different personal and political reactions.\textsuperscript{257} Although Justice Scalia is known for his feelings against drugs, Justices Thomas, Scalia, and Alito have been characterized as supporting movements away from gun control legislation.\textsuperscript{258} Yet, political considerations are not always conclusive either.\textsuperscript{259} It is quite possible that, “years from now . . . the most significant impact that our new Justices [could] have had on the law has little to do with contemporary hot button social issues such as . . . guns and more with federal regulation that has for decades been justified under the Commerce Clause.”\textsuperscript{260} While considering political opinions may clarify the rationale behind judicial decisions, the significance of legal precedent should not be minimized.

\textbf{CONCLUSION}

As established above, the Supreme Court remained consistent with the precedent established in \textit{Lopez} through the recent decision in \textit{Raich}. Judge Alito’s dissent in \textit{Rybar} was thus not only misguided in light of the precedent at the time, \textit{i.e.}, \textit{Lopez}, but now appears completely misguided in light of both the current position of the Supreme Court as set forth in \textit{Raich} and current position of the majority of every circuit that has considered the Machine Gun Statute’s constitutionality thus far.\textsuperscript{261} Therefore, based on precedent alone, the Machine Gun Statute’s longevity is promising.

Additionally while the composition of the current Supreme Court provides further insight on the future of the Machine Gun Statute, it does not necessarily provide closure to the issue. Although the outcome in \textit{Raich} is helpful in analyzing the current opinions of the Justices regarding Commerce Clause issues, two of the Justices are no longer on the bench. Moreover, since Justice Alito’s reasoning was mistaken based on the


\textsuperscript{256} See Lewis, supra note 198, at 28 (suggesting both Justice Alito and Chief Justice Roberts have federalist tendencies).

\textsuperscript{257} See supra Part II.C.

\textsuperscript{258} See supra notes 195-97.

\textsuperscript{259} See supra Part II.C.


\textsuperscript{261} See supra Parts I.D, II.A.2 and accompanying text.
precedent available at the time and would remain inconsistent according to *Raich*, there is no telling what could happen should the Court actually consider the Machine Gun Statute with Justice Alito and Chief Justice Roberts on the bench. While all reasonable indicators suggest the Machine Gun Statute would survive Supreme Court scrutiny, some believe that political considerations could taint the analysis of the precedent. After all, it has been said that the appointment of both Justice Alito and Chief Justice Roberts places the United States "on the brink of a watershed for the conservative movement." Yet, for the Court to so denigrate precedent simply seems unlikely, and thus the Machine Gun Statute would likely survive Supreme Court scrutiny.

Notes & Observations